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No. 54

In the Supreme Court of the United States

OCTOBER TERM, 1960

CARL BRADEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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CITATIONS

Cases:

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OPINION BELOW

The opinion of the court of appeals (R. 112–124) is reported at 272 F. 2d 653.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1959 (R. 124), and a petition for a rehearing was denied on January 12, 1960 (R. 128). On February 2, 1960, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including March 12, 1960. The petition was filed on March 10, 1960, and certiorari was granted on April 25, 1960 (R. 149; 362 U.S. 960). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the House Committee on Un-American Activities, possessing information that petitioner was an important member of the Communist Party who had engaged in Communist activities in the South, was authorized by the House of Representatives to subpoena and question him as to his membership and activity in the Communist Party, in the course of a duly authorized investigation into Communist activities in the South.

2. Whether the issue of actual pertinency should have been decided by the jury.

3. Whether the questions which petitioner refused to answer were pertinent to the subject under inquiry and whether petitioner was made aware of their pertinency.

4. Whether petitioner's refusal to answer was wilful as required by 2 U.S.C. 192.

5. Whether the questioning of petitioner at the subcommittee hearings violated his rights under the First Amendment.

STATUTE AND RESOLUTION INVOLVED

2 U.S.C. 192 (R.S. 102, as amended) provides:

> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or

> who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

The pertinent provisions of Rules X and XI of the House of Representatives, adopted for the Eighty-fifth Congress, by H. Res. 5, 85th Cong. (R. 83),[1] are set forth at R. 129–134.

STATEMENT

Petitioner was charged in a six-count indictment (R. 3–5), returned in the District Court for the Northern District of Georgia, with having knowingly, wilfully, and unlawfully refused, in violation of 2 U.S.C. 192, to answer six questions pertinent to the matter under inquiry, asked him by a subcommittee of the House Committee on Un-American Activities.[2] Following a trial by jury, the petitioner was found guilty on all six counts (R. 10) and was sentenced to twelve months' imprisonment on each count, the

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[1] The Rules which the House thus specially adopted for the Eighty-fifth Congress were, in pertinent part, identical with its standing Rules X and XI, as amended by the Legislative Reorganization Act of 1946, c. 753, § 121, 60 Stat. 812, 822, 823, 828. It was during the Eighty-fifth Congress that the refusals to answer the questions here involved occurred.

[2] The subcommittee unanimously agreed that a report should be made of petitioner's contumacy to be submitted to the House of Representatives recommending that petitioner be cited for contempt (R. 142–143), and this report was approved and adopted by the full Committee (R. 144–145). The House certified the Committee's report to the United States Attorney for prosecution (R. 146–148).

sentences to run concurrently (R. 77–78). On appeal to the Court of Appeals for the Fifth Circuit, the judgment of conviction was affirmed. (R. 112–124).

The offenses here involved arose out of hearings held in Atlanta, Georgia, by a subcommittee of the Committee on Un-American Activities on July 29, 30, and 31, 1958, at which petitioner was subpoenaed to appear as a witness. For a detailed summary of these hearings, we respectfully refer the Court to the Statement in our brief in *Wilkinson* v. *United States*, No. 37, this Term, pp. 3–26, which quotes or describes: Rules X and XI of the standing Rules of the House of Representatives which gave the Committee its authority (pp. 3–4); the resolution of the Committee authorizing these particular hearings (p. 4); the opening statement of the Chairman of the Committee at the hearings (pp. 6–8); a summary of the questioning and testimony of witnesses appearing before and after petitioner, and the statements made by the subcommittee to them (pp. 8–24); and the closing statement of the Chairman of the subcommittee (pp. 25–26).[3]

The other pertinent facts introduced at petitioner's trial are as follows:

The Staff Director of the Committee testified at petitioner's trial that the hearings in Atlanta were

[3] All of these materials were introduced at petitioner's trial through U.S. Ex. 10, which is the printed transcript of the hearings on July 29, 30, and 31, 1958, before a subcommittee of the Committee on Un-American Activities, House of Representatives, 85th Cong., 2d Sess., entitled "Communist Infiltration and Activities in the South." Instead of including this transcript in the record in petitioner's case, counsel have stipulated (R. 141) that reference be made to the record in *Wilkinson*, No. 37, at pp. 71–233.

called "to develop factual material respecting communist operations in the Southland, communist propaganda, communist techniques, communist infiltration, all for the purpose of having a fund of information with which the committee could appraise legislative proposals then pending before the committee either in the form of bills or in the form of suggestions and for the purpose of enabling the committee to fulfill its duty under the Legislative Reorganization Act of maintaining a constant surveillance over the administration and operation of the then existing Internal Securities Laws" (R. 26). He mentioned, in particular, H.R. 9937, 85th Cong., which was pending before the Committee and would have amended various existing statutes dealing with Communist activities.*

In his opening statement at the hearings, the Chairman of the Committee explained that the purpose of the hearings was to obtain information about Communist activities in the South which would be relevant to the Committee's consideration of existing and contemplated legislation (U.S. Ex. 10, pp. 2606–2607). The investigation was to be based on "[p]reliminary investigations by the staff of this committee [which] indicate that the principal Communist Party activities in the South are directed and manipulated by agents who are headquartered in Communist nests in concentration points in the metropolitan areas of the North" (*id.* at 2607).

The first witness at the hearings was Armando Penha, who was a member of the Communist Party

* See our brief in *Wilkinson*, No. 37, p. 16, note 7.

from 1950 to 1958 at the request of the F.B.I. and was a member of the Party's National Textile Commission. The Commission was "the leading body, nationally, that is set up for the purposes of controlling, coordinating, and supervising the infiltration and colonization within the textile industry, particularly within the South" (U.S. Ex. 10, p. 2609). He testified that the Party used "front" organizations, which are either formed by the Party or infiltrated and taken control of by it, "to undermine and harass our entire security system" (*id.* at 2623); that it was the aim and purpose of the Communist Party in the South to "agitate and use every means within their command to raise political and economic issues of the Negro people in order to create mass agitation and foment discord at the same time" (*id.* at 2612); that the Party, in attempting to bring pressure on the Congress, had been very effective in utilizing non-Communists to petition Congress in opposition to proposed legislation distasteful to that Party (*id.* at 2623–2624); and that Party activities in the South are directed from Party headquarters in the North (*id.* at 2627).

The next witness, Eugene Feldman, had been identified by Penha as a "colonizer"[5] in the South for the Communist Party (U.S. Ex. 10, pp. 2619–2620). Feldman refused to answer virtually every question asked by the subcommittee, including whether "it is not a fact that you are the editor and publisher of the Southern Newsletter"; whether a document

[5] For a definition of a "colonizer," see U.S. Ex. 10, p. 2611, and our brief in *Wilkinson*, No. 37, pp. 9–10.

showed him by the subcommittee was a true reproduction of an application made by him as editor and publisher of that publication for a post office box in Louisville, Kentucky; whether the Southern Newsletter had a postal permit; whether a particular copy of the Southern Newsletter had been mailed by him from Chicago; whether he denied being a member and "colonizer" of the Communist Party; whether he knew a person named Perry Cartwright; and whether Perry Cartwright was an associate of his on the Southern Newsletter (*id.* at 2630–2633). Feldman was then asked and refused to answer whether he knew Carl and Anne Braden, of Louisville, Kentucky, and whether they were colleagues of his in the work of the Southern Newsletter in that area of the South (*id.* at 2633).

Subsequently, Feldman was asked another series of questions, including whether Don West, who had been identified by Penha as a member of the Communist Party (*id.* at 2627), was a contributor to the Southern Newsletter; whether West "ha[d] a definite connection with the Southern Newsletter," in light of a copy shown to the witness which included West among the contributors and had an article signed by him; whether Mr. and Mrs. Carl Braden were connected with the Southern Newsletter and whether they were Party members; and whether Perry Cartwright was a Party member (*id.* at 2634). The Chairman and Staff Director of the subcommittee stated that the Committee had information that Feldman was the editor of the Southern Newsletter, and that it was published

in Chicago and distributed from Louisville (*id.* at 2634–2635).

After hearing an intervening witness, the subcommittee called Perry Cartwright. He testified that he was business manager of the Southern Newsletter; that it had a circulation of about 2,100 in the southern states; that it was published in Chicago and mailed from Louisville; and that he was not a member of the Communist Party (U.S. Ex. 10, pp. 2644–2645, 2647). He refused to answer who was the editor of the Southern Newsletter because he refused to inform on others, but said that the fact that his and Feldman's name appeared on the publication together "should be answer enough" (*id.* at 2645–2646). He refused to answer whether Carl and Anne Braden were "connected in an official capacity with the Southern Newsletter" (*id.* at 2646).

Petitioner was the first witness called to testify on the second day of the hearings, July 30, 1958. The Staff Director of the Committee testified at petitioner's trial that, at the time he was subpoenaed, the Committee had the following information (R. 27–28):

> First of all it was our information that Mr. Braden was a member of the Communist Party, that he was engaged as a communist with an organization known as the Southern Conference Educational Fund which was the subject of investigation by the Internal Security Subcommittee which found in essence that the Southern Conference Educational Fund was for all intents and purposes the successor organization to the Southern Conference for Human

Welfare which had been cited as a communist front. We had the information that Mr. Braden was a field representative for the Southern Conference Educational Fund. In that capacity he was going over the Southland covering a number of states setting up meetings, disseminating communist propaganda, doing communist work in the South. It was also our information that Mr. Braden was a contributor, a writer for a publication circulating in the South under communist auspices known as the Southern News Letter, the driving or leading persons of which were known communists. It was our information that Mr. Braden had in the period of time, a short time prior to the time he was actually subpoenaed or a subpoena was issued for his appearance, had left Louisville, Kentucky, which was his home, had then been on a tour in furtherance of Communist Party objectives at the behest and direction of the Communist Party. He had been there in Atlanta and he had been to New Orleans and that he was then enroute to confer with another communist by the name of Harvey O'Connor who was a leading figure and is now a leading figure in another organization controlled by the conspiracy known as the Emergency Civil Liberties Committee. That conference was scheduled to take place and did take place some place in Rhode Island. There are other collateral and incidental factual items which we had, but I have given you the highlights.

The Staff Director stated that petitioner "had something to do with the preparation and dissemination of petitioners [*sic*] which were circulated in the South-

land for the purpose of precluding or attempting to preclude or softening the * * * hearings" in Atlanta. He testified that "these petitions were circulated by communists as communists under communist direction and that in the process of the circulation and the procurement of the petitions, the communists were practicing a communist technique which the committee wanted information on. They were not interested in whether or not they were petitions, but our interest in presenting it to the committee was the communistic technique in failing to disclose that the solicitation of the commission was by people under communist discipline" (R. 29, 30). The Staff Director then reiterated that the Committee had information identifying petitioner as a Communist (R. 30).

The Staff Director described in considerable detail at petitioner's trial the information possessed by the Committee as to petitioner's activities and those of his associates on behalf of the Communist Party. He testified that petitioner had come to Atlanta, in December 1957, to infiltrate organizations as part of his Party activities; that Harvey O'Connor (see *infra*, pp. 12, 14, 20) was a member of the Communist Party and "in that capacity he served as the principal officer of the Emergency Civil Liberties Committee"; that the Southern Newsletter was Communist controlled, that its leader (either editor or publisher), Eugene Feldman, had been repeatedly identified as a Communist, and that it principally contained Communist propaganda (R. 30–32). The Committee also had information that petitioner

had participated as a Communist in the Southern Newsletter by contributing to it and apparently by helping to distribute it (R. 31). The Committee knew that the publication was sent to a post office box number in Louisville where petitioner lived and was redistributed from there; "one of the things that we wanted to elicit and attempted to elicit from [petitioner] was his participation in that particular enterprise" (R. 31).

On cross-examination at the trial, the Staff Director stated that the Committee knew that the Southern Conference Educational Fund devoted much of its energy on behalf of the integration movement, but said that its information was that the integration movement in this regard was being used "as a facade for Communist Party purposes. * * * It has been our experience within this particular instance that Communist [*sic*] use any movement that they can possibly wangle themselves into for the purpose of agitation and propaganda and for the purpose of the ultimate objectives of the conspiracy and not for the purpose [for] which it was set up" (R. 36–37).

After petitioner was sworn at the hearing,[6] he gave his name and stated that he was a worker "in the integration movement in the South, having been employed by the Southern Conference Educational Fund * * *" as a field secretary (U.S. Ex. 10, pp. 2667–2668). He said that, at the time he was served with the Committee's subpoena, he was visiting Harvey O'Connor in Rhode Island, who, he said, was the

[6] Petitioner was represented by two attorneys (U.S. Ex. 10, pp. 2667–2668).

national chairman of the Emergency Civil Liberties Committee (*id.* at 2668). When petitioner was asked from where he had departed to go to Rhode Island, he refused to answer on the ground that the question was not pertinent and violated his rights under the First Amendment (*id.* at 2668–2669). The Staff Director advised petitioner (*id.* at 2669–2670):

> * * * I should like, for the purpose of making the record absolutely clear, to explain to the witness now the pertinency of the question.
>
> Sir, it is our understanding that you are now a Communist, a member of the Communist Party; that you have been identified by reputable, responsible witnesses under oath as a Communist, part of the Communist Party which is a tentacle of the international Communist conspiracy. It is our information further, sir, that you as a Communist have been propagating the Communist activity and the Communist line principally in the South; that you have been masquerading behind a facade of humanitarianism; that you have been masquerading behind a facade of emotional appeal to certain segments of our society; that your purpose, objective, your activities, are designed to further the cause of the international Communist conspiracy in the United States.
>
> Now, there is pending before the Committee on Un-American Activities pursuant to its authority, its duty, and its responsibility legislation. Indeed, the chairman of the Committee on Un-American Activities sometime ago introduced a bill, H.R. 9937, which has numerous provisions which are being considered by the

Committee on Un-American Activities. Some of these provisions undertake to tighten the security laws respecting registration of Communists; some of these provisions undertake to tighten the security laws respecting the dissemination of Communist propaganda. Some of these security laws preclude certain types of activities, the very nature of which we understand you have been engaged in.

In addition to that, sir, there is pending before the Committee on Un-American Activities a series of proposals that are not yet incorporated into legislative form, which the committee is considering. In addition to that, the Committee on Un-American Activities has a mandate from the Congress of the United States to maintain a surveillance over the administration and operation of numerous security laws that are presently on the statute books, including the Internal Security Act, the Communist Control Act of 1954, the Foreign Agents Registration Act, espionage and sabotage statutes.

It is for that reason and for these reasons which I have just described to you that this committee has come to Atlanta, Georgia, for the purpose of assembling factual material which the committee can use, in connection with other material which it has assembled, in appraising the administration and operation of the laws and in making a studied judgment upon whether or not the current provisions of the laws are adequate and whether or not each or any of these proposals pending before the committee should be recommended for enactment.

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> If you, sir, now will tell us, in response to the last outstanding principal question, where you have been immediately prior to your sojourn in Rhode Island with Harvey O'Connor, who has been identified as a hard-core member of the Communist conspiracy, head of the Emergency Civil Liberties Committee, and other organizations that have been cited by a congressional committee as Communist fronts.
>
> If you will tell us, sir, now of your activities in this connection, that will add to the fund of knowledge of this committee so that it can more adequately discharge the duties and responsibilities which it has upon it.
>
> Now, Mr. Chairman, on the basis of that explanation of the pertinency of the question which I have posed to this witness, I respectfully suggest that you now order and direct this witness either to answer the question or to invoke his privileges under the fifth amendment against giving testimony which could be used against him in a criminal proceeding.

Petitioner was asked and refused to answer, again on pertinency and First Amendment grounds, whether he was then a member of the Communist Party (U.S. Ex. 10, p. 2670). The Staff Director of the Committee then stated (*ibid.*):

> I want the record to be absolutely clear, sir, so we do not put this committee in the ludicrous position of a complete, thorough explanation in response to each invocation of alleged lack of pertinency, that the explanation which I gave to you as to the pertinency of the question is understood to be applicable to similar

> questions which I am intending to propose to you.

The Staff Director and Chairman of the subcommittee each then repeated the latter statement in substance (*id.* at 2671). The Staff Director emphasized that petitioner's beliefs were not under investigation but only whether he was participating in an organization controlled by the Communist conspiracy.

Petitioner was asked and refused to answer, giving the same reasons, whether another witness, Alberta Ahearn, who was a former member of the Communist Party, had erred in saying that she knew petitioner as a Party member (U.S. Ex. 10, p. 2671). When petitioner also objected that "[t]he mandate of this committee is so vague that nobody knows what you are supposed to be investigating", the Staff Director stated "communism and Communists" (*ibid.*). Petitioner claimed that the subcommittee was investigating integrationists; Representative Jackson, a member of the subcommittee, answered that those subpoenaed had also been identified as Communists and the subcommittee was trying to determine that fact (*id.* at 2671–2672). He further explained to petitioner that Congress had instructed the Committee (*id.* at 2672):

> to investigate the extent and scope of [Communist] propaganda activities within the United States. That is precisely what we are doing. And when you cast doubt, or attempt to cast doubt, on the relevancy of the question when you are in the position you are to influence public opinion through your writings—and I gather through your writings on behalf of the Commu-

> nist Party—it is very clearly within the purview of this committee to inquire into those activities. I do not care what you think. I have not the slightest interest in * * * your opinions. * * *
>
> What I am interested in, is what are you doing on behalf of the Communist Party? We are not going to be clouded, so far as I am concerned, by talking about integration and segregation. This committee is not concerned in that. This committee is concerned in what you are doing in behalf of the Communist conspiracy. It may be that your actions parallel, as the chairman said, a very humanitarian thing * * *.

Representative Jackson then again indicated that the hearings were investigating only Communist activity and said: "[L]et us not be clouding this discussion * * * that we are here as representatives of the United States Government to further, or to destroy, or to have anything to do with, integration. I resent it [petitioner's claim] as an individual member of the Congress" (*id.* at 2673).

Petitioner read to the subcommittee an open letter to the House of Representatives protesting the Committee's action in holding a hearing in Atlanta in an effort to harass supporters of integration (U.S. Ex. 10, pp. 2673–2674). He refused, however, to answer what he, as "an identified member of the Communist Party [had] to do with this letter": "I will have to stand on my first amendment rights for private beliefs and association on the grounds that the question has no possible pertinency to any legislation" (*id.* at

2674). He refused to answer whether he had prepared the letter because of his First Amendment rights, the vagueness of the resolution establishing the Committee, and "the pertinency of the investigation and the legislative—" (*ibid.*). Representative Jackson then explained the reason for the questions (*ibid.*):

> There is a very strong possibility that that letter was prepared by a Communist; and it points up one of the things that this committee has been trying to put across, that well-meaning people pursuing a very worthwhile goal are very frequently not sufficiently advised as to what they are doing when they lend their names to various petitions, letters, and so forth. A very strong likelihood exists—and we cannot know because of the refusal of the witness to answer whether he prepared this letter—but a strong likelihood exists that the letter in question was prepared under Communist direction; that those who signed it signed a document which was prepared by the Communist Party for their own purposes.

Petitioner testified that he was last in Atlanta in May 1958, as part of his work as field organizer or secretary of the Southern Conference Educational Fund (U.S. Ex. 10, p. 2675). He refused to state whether a meeting had been held in Atlanta at that time because of his First Amendment rights, the vagueness of the Committee's mandate, and "the question has no possible pertinency to any possible legislative purpose" (*ibid.*). Petitioner said that he had also been in Atlanta in December 1957, but refused to answer the question, "And did you partici-

pate in a meeting here at that time?" (count one.)[7] (*ibid.*). The reasons given were the First Amendment, the vagueness of the resolution establishing the Committee, and the lack of pertinency of the question, citing *Watkins* v. *United States*, 354 U.S. 178 (*id.* at 2675–2676). The Chairman of the subcommittee told petitioner that he was placing himself "in a position of saying that Congress has no right to inquire into the Communist conspiracy in America" (*id.* at 2676). The Staff Director added to his earlier explanation of pertinency (*id.* at 2676–2677):

> Before this committee, Mr. Braden, a day or so ago, Mr. Armando Penha took an oath and testified respecting Communist Party techniques—Mr. Penha was in the Communist conspiratorial operation in this country at the behest of the Federal Bureau of Investigation, and he served there for 8 years. In the course of his testimony yesterday he said, in effect on this issue, that the comrades are under a directive to penetrate non-Communist organizations, fine, patriotic, humanitarian organizations for

[7] The Staff Director explained the purpose of this question at petitioner's trial (R. 32):

> We are attempting to elicit from Mr. Braden information respecting his participation as a communist in a meeting here in Atlanta for the purpose of developing information about the technique of communists in penetrating groups and organizations on behalf of the communist party. One of the things we had in mind to attempt to develop would be factual material which could be used by the committee in its appraisal of legislation then pending on redefining certain activities which might be encompassed within legislative mandates, such as the Smith Act.

> the purpose of worming their way in, to further the Communist objectives.
>
> I am now going to display to you, sir, some photographs, showing you and your wife entering the American Red Cross Building in Atlanta, December of 1957, at which time it is our understanding you were a participant in sessions there. We should like to have you, first of all, look at these photographs and tell the committee whether or not they are true and correct reproductions of your physical features as you were entering the American Red Cross in December of 1957, a fine, humanitarian, patriotic organization.

Petitioner identified in a photograph himself, his wife, Aubrey W. Williams, and James A. Dombrowski, the executive secretary of the Southern Conference Educational Fund and said that the pictures were apparently taken when the board of the Fund met in the Red Cross Building on December 15, 1957 (U.S. Ex. 10, p. 2677). He refused on the same grounds as he had earlier stated to answer the questions: "Who solicited the quarters to be made available to the Southern Conference Educational Fund" (count two) and "Are you connected with the Emergency Civil Liberties Committee?" (count three)* (*id.* at 2677–

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*The Staff Director stated at petitioner's trial the purpose of these questions (R. 32–33):

> That question tied in with the preceding questions in the course of the hearings which we were attempting to determine whether or not certain quarters had been solicited by a person who was a communist in order to develop factual information on technique which is a pattern of communist operation of soliciting noncommunist facilities for the purpose of disguising the true identity of the promoters of a

2678). Petitioner stated that he and his counsel understood that, as to each of his refusals to answer, the Chairman was ordering him to answer and "an appropriate explanation of the pertinency" has been given (*id.* at 2678).

Petitioner was asked whether his "association with Harvey O'Connor, an identified Communist, in Rhode Island [was] in furtherance of the work of the Emergency Civil Liberties Committee?" (U.S. Ex. 10, p. 2678). Petitioner said that he was there on vacation. He refused, however, to answer, on the same grounds:

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group and, that again, had the information been forthcoming it would have been helpful to the committee in the appraisal not only of existing legislation, then existing legislation and its administration and operation, but in assisting the committee in appraisal of proposals then pending before the committee legislativewise.

* * * * *

The information which was sought to be obtained there was any connection which this particular witness who had been identified as a communist may have had with an organization which itself had been found by the Senate Internal Security Subcommittee to be a communist front, more particularly, we were concerned with developing this information because it was suggested to the committee and was our information that this witness had been in recent conference with the head of the Emergency Civil Liberties Committee who himself was a communist, identified as a communist. This information, had it been forthcoming, would have added to the fund of knowledge of the committee itself, our committee, the committee on Un-American Activities in appraising the function and activity of the Emergency Civil Liberties Committee and determining whether or not our committee, had it been forthcoming, plus other information which we then had, might be sufficient quantity of information for the committee to itself cite the Emergency Civil Liberties Committee.

"Did you and Harvey O'Connor, in the course of your conferences there in Rhode Island, develop plans and strategies outlining work schedules for the Emergency Civil Liberties Committee?" (count four)* (*ibid.*)

Petitioner refused to answer on the ground of the vagueness of the question whether he had, as a field organizer of the Southern Conference Educational Fund, promoted political pressure on Congress regarding security legislation (U.S. Ex. 10, p. 2678). The subcommittee then showed petitioner a letter addressed to "Dear Friend," asking the recipient to write his congressman, and to urge others to write, opposing particular legislation (*id.* at 2679). Petitioner admitted that he and his wife had signed the

*The Staff Director testified at petitioner's trial that the purpose of this question was (R. 33–34):

> As I have already indicated, our committee, the Un-American Activities Committee, had a deep concern over the activities of the Emergency Civil Liberties Committee, its functions across the country. We were trying to elicit here information as to what may have developed between two persons who had been identified as communists respecting plans and strategies of an organization which itself has been engaging in dissemination of communist propaganda and which according to the findings of the Senate Internal Security Subcommittee is itself a communist front. All this information, had it been forthcoming, would have added appreciably to the fund of knowledge of the committee in its appraisal of legislative proposals then pending and in the administration of the Internal Security Act which has provisions for citation of organizations as communist fronts, and I am not presently aware of any outstanding citation by the subversive activity control board of the Emergency Civil Liberties Committee.

letter, but he refused to answer, on the same grounds as previously, the question: "Were you a member of the Communist Party the instant you affixed your signature to that letter?" (count five)[10] (*ibid.*).

The Staff Director of the Committee explained to petitioner that Eugene Feldman, who has been identified as a Communist, was the editor of the Southern Newsletter, and that this publication originates in Chicago and is shipped to Louisville from whence it is distributed throughout the South (U.S. Ex. 10, p. 2679). He then said to petitioner: "I would just like to ask you whether or not you, being a resident of Louisville, Kentucky, have anything to do there with the Southern Newsletter?" (count 6)[11] (*ibid.*). Peti-

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[10] The Staff Director explained the purpose of this question at petitioner's trial (R. 34):

> I have previously on this record alluded to a letter which was sent by the defendant in this proceeding and another person to a number of persons respecting legislative activity [see *supra*, pp. 9–10]. It was of deep concern to this committee to determine not whether or not the letters were sent, because everyone has a right to send letters, not to determine whether or not petitions were being sent to the Congress, but to determine what were the techniques involved by the Communist Party in procuring signatures and in disseminating the Communist Party line at the behest of the conspiratorial operation in the country. Again it would have been, in my judgment, valuable information for the committee to obtain, again for the purpose of appraising communist party techniques in its operation in the United States.

[11] The Staff Director testified at petitioner's trial as to the purpose of this question (R. 34–35):

> As I have previously indicated on this record, it was the information of the committee that this particular witness had been a writer of articles or columns or something of the kind that appeared in the Southern Newsletter. It was

tioner refused to answer on the same grounds (*id.* at 2679–2680).

The Staff Director told petitioner that the Southern Conference Educational Fund is the successor organization to the Southern Conference for Human Welfare which had been cited as a Communist front and was operating under the same leadership; that he (petitioner) was connected with the Emergency Civil Liberties Committee which also has been so cited; and that a witness had sworn that petitioner was a member of the Communist Party (U.S. Ex. 10, p. 2680–2681).

The next witness after Braden was Frank Wilkinson, who was also convicted of contempt and is the petioner in No. 37, this Term. When Wilkinson refused to answer whether he was a member of the Communist Party, the Staff Director of the Committee explained the purpose of the hearings to the witness. In his remarks, the Staff Director said (U.S. Ex. 10, p. 2682):

> "[I]t is the information of this committee that you now are a hard-core member of the Com-

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also the information of the committee, and we were not too certain about what the facts were, that the Southern Newsletter was being channeled from Chicago to Louisville, Kentucky, where the defendant lived, on out through Southland, that there was a lockbox or a post office box, I should say, in Louisville. We were trying to develop from this witness information as to his connections with the Southern Newsletter, all for the purpose of developing factual material respecting a publication which we knew was Communist controlled and which was disseminating Communist propaganda for the purpose of enabling the committee to have additional fund of factual material which it could appraise pending proposals, which it could appraise administration and operation of the then existing internal security legislation on the statute books.

> munist Party; that you were designated by the Communist Party for the purpose of creating and manipulating certain organizations, including the Emergency Civil Liberties Committee, the affiliate organizations of the Emergency Civil Liberties Committee * * *.

Later, Wilkinson refused to answer whether a document shown to him by the subcommittee was a true reproduction of the registration form he filled out at the Atlanta Biltmore Hotel. The form listed Wilkinson and James A. Dombrowski,[11a] and Wilkinson's business firm as the Emergency Civil Liberties Committee, New York (*id.* at 2685). Wilkinson likewise refused to answer whether he was "the principal driving force, the leader," of the Emergency Civil Liberties Committee (*id.* at 2686).

SUMMARY OF ARGUMENT

I

The Committee's resolution authorizing the hearings, the testimony of the Staff Director of the Committee at petitioner's trial, the opening statement of the Chairman of the Committee at the hearings, the questioning and testimony of other witnesses at the hearings, the subcommittee's explanation of the questions asked petitioner when he refused to answer, and the closing statement of the subcommittee Chairman at the hearings show that the subcommittee was investigating two subjects when it questioned petitioner.

[11a] The Staff Director testified at petitioner's trial that Dombrowski was the chief officer of the Southern Conference Educational Fund (R. 31).

The first was Communist infiltration and colonization activities in the South and the second was the Party's propaganda activities, principally in the South. As we show in our brief in *Wilkinson* v. *United States,* No. 37, this Term, pp. 39–40 (Wilkinson testified immediately before the petitioner here in these same hearings), these two subjects of inquiry came clearly within Rule XI of the standing rules of the House (the Committee's authorizing resolution) and its gloss of legislative history which have "clothed the Un-American Activities Committee with pervasive authority to investigate Communist activities in this country." *Barenblatt* v. *United States,* 360 U.S. 109, 118.

Petitioner, in claiming that Rule XI is fatally vague, attempts unsuccessfully to distinguish *Barenblatt. Barenblatt,* like this case, involved a criminal prosecution. Communist infiltration and propaganda activities, which were the subjects under investigation here, are just as fully within the pervasive authority of the Committee as Communist activity in the field of education, the subject being investigated in *Barenblatt.* And the question asked petitioner as to whether he was a Communist Party member at a particular time—a question which is itself sufficient to sustain the conviction—is virtually identical with one of the questions upheld by this Court in *Barenblatt.*

II

The six questions which petitioner refused to answer were each pertinent to the subjects under inquiry, as a

matter of law, and this pertinency was made clear to petitioner.

A. Petitioner admitted at the beginning of his trial that actual pertinency was an issue of law for the court. Only after the jury had been excluded from hearing evidence on this issue, the court had ruled against petitioner, and the charge to the jury was completed, did petitioner claim that the issue was properly one for the jury. His claim at this time was too late: first, the jury did not have the necessary evidence before it, and, second, he cannot fairly allow the trial court, with his tacit agreement, to rule on the issue and then object only when the court's decision is unfavorable.

In any event, this Court has held in *Sinclair* v. *United States*, 279 U.S. 263, 299, that the actual pertinency of the question to the subject under investigation, like relevancy and materiality, present questions of law, properly to be decided by the trial court. Petitioner, however, relying on a single ambiguous court of appeals' decision, claims that actual pertinency is an issue for the jury when evidence outside the committee hearings is relied on. Even if this proposition is consistent with *Sinclair*, the jury here found as a fact (on the basis of the Committee hearings) that petitioner was apprised of the pertinency of the questions; this necessarily included a finding that the questions were in fact pertinent.

B. All six questions were clearly pertinent to the subjects under inquiry. The Committee had information that the petitioner was a Communist Party member active in Communist propaganda and other Party

work in the South; that he was connected with the Southern Conference Educational Fund, the Emergency Civil Liberties Committee, and the Southern Newsletter; and that these three organizations were Communist controlled or at least heavily infiltrated and were engaged in Communist propaganda and other work. The six questions either would have provided, in themselves, further information on Communist infiltration or propaganda activities, or were introductory questions which would show whether petitioner could provide further information on these subjects.

C. The jury found that petitioner was apprised of the pertinency of the six questions to the subjects under inquiry. This finding is fully supported by the record.

1. The subjects under inquiry were described to petitioner by the means prescribed in *Watkins* v. *United States*, 354 U.S. 178, 211–214: the resolution authorizing the subcommittee hearings, the opening statement of the Chairman, the questioning and testimony of other witnesses; and the response of the subcommittee when petitioner refused to answer. In fact, the latter source alone clearly informed petitioner that the subjects under inquiry were Communist infiltration and propaganda activity, especially in the South. And petitioner himself indicated that he understood that these were the subjects under inquiry.

2. As to the connective reasoning between the subjects of Communist infiltration and propaganda activity and the particular questions asked, petitioner indi-

cated that he understood the pertinency of the questions which had been explained to him, even though he disagreed that the subcommittee had any constitutional authority to investigate these subjects. In addition, the subcommittee's statements to petitioner clearly showed to any reasonable person the relationship of the questions and the subjects under inquiry. This is particularly true of the question as to petitioner's membership in the Communist Party. In *Barenblatt,* this Court held, with regard to a similar question as to Party membership, that "pertinency * * * was clear beyond doubt" (360 U.S. at 125), without any further explanation, to an investigation of Communist activity.

III

A. Petitioner claims that he relied on *Watkins* v. *United States, supra,* and that therefore he could not be convicted of "wilful" refusals to answer. But in *Sinclair* v. *United States, supra,* this Court held that a mistaken view of the law is not enough to reverse a conviction under the predecessor statute to 2 U.S.C. 192. This holding was reaffirmed in *Watkins* itself, and both this Court and the lower courts have uniformly held that 2 U.S.C. 192 requires proof only of a deliberate, intentional, refusal to answer.

B. The trial court charged the jury that it must find that petitioner intentionally refused to answer. Under this charge, to which petitioner did not except, the jury found that petitioner did so refuse to answer and this finding is fully supported by the record.

IV

The subcommittee's investigation did not violate the First Amendment.

A. As we show in our brief in *Wilkinson*, No. 37, pp. 51–52, the two subjects under inquiry when petitioner testified—Communist infiltration and propaganda activity in the South—are under *Barenblatt*; 360 U.S. at 127–132, valid legislative purposes, clearly not prohibited by the First Amendment.

Petitioner's attempts to distinguish *Barenblatt* are unavailing. First, that case did not determine that Congress can only investigate the Communist Party itself; rather, it upheld an investigation of Communist activity in education. Second, while *Barenblatt* directly considered only questions relating to the witness' Party membership, the whole rationale of the decision supports the power of a congressional committee, having information of Communist activity in educational institutions, to inquire further into the nature of that activity. In any event, one of the counts here—which, as we have said, is in itself enough to sustain the conviction—concerned petitioner's Party membership. Third, *Barenblatt* does not uphold investigation only of Communist activity shown to be directly related to overthrow of the Government. Instead, the Court found a "close nexus between the Communist Party and violent overthrow of government" (360 U.S. at 128), making clear that the nature of the Party itself supplied the connection between investigation of Communist activities and forcible overthrow. And the Court further emphasized that "[t]he strict requirements of a prosecution

under the Smith Act * * * are not the measure of the permissible scope of a congressional investigation into 'overthrow,' for of necessity the investigatory process must proceed step by step" (*id.* at 130).

Petitioner alleges a whole series of non-legislative purposes for the inquiry. But the Committee was at all times inquiring into Communist activities—a proper legislative objective. Both Communist criticism of the Committee and Communist petitions to Congress constitute one form of the Party's propaganda activity. The record shows that the questions as to the Emergency Civil Liberties Committee were intended not only to determine whether it should be cited as a Communist front but also to obtain information on Communist propaganda activity. And the subcommittee made clear that it was investigating Communist activity, not integration or civil rights.

B. In *Barenblatt*, the Court held that "the balance between the individual and the governmental interests here at stake must be struck in favor of the latter, and that therefore the provisions of the First Amendment have not been offended" (360 U.S. at 134). In the Government's Brief in *Wilkinson*, No. 37, pp. 55–60, we point out that the governmental interests at stake are at least as strong as those in *Barenblatt*. Since the same hearings and two of three subjects under inquiry are involved in this case and in *Wilkinson*, the governmental interest is virtually identical in both cases.

Petitioner claims that the Committee had no information that petitioner was a Communist Party member or that any of the organizations as to which he

was questioned had any connection with the Communist Party. In fact, however, the record of the hearings and of petitioner's trial demonstrate quite the contrary; the Committee had a large amount of information, much of it based on witnesses disclosed to petitioner and on prior investigations by another congressional committee. While this evidence would not constitute judicial proof, *Barenblatt* required only that the subcommittee have "probable cause for belief that [the witness] possessed information which might be helpful to the Subcommittee" (360 U.S. at 134). The record here shows that this standard was fully met.

ARGUMENT

Petitioner here was the witness immediately preceding the petitioner in *Wilkinson* v. *United States*, No. 37, this Term, at hearings of a subcommittee of the House Committee on Un-American Activities. The principal issues raised by petitioner in the instant case are virtually identical with those involved in *Wilkinson* regarding the authority of the Committee, the pertinency of the questions asked, and the rights of witnesses under the First Amendment. As we state in our brief in *Wilkinson*, these issues are fully answered and controlled by this Court's decision in *Barenblatt* v. *United States*, 360 U.S. 109. Petitioner's only two other contentions—those relating to whether the issue of pertinency should be decided by a jury and whether petitioner's refusal to answer was wilful—are likewise controlled by a decision of this Court, *Sinclair* v. *United States*, 279 U.S. 263. We discuss each of petitioner's claims in the context of this particular record.

I

THE COMMITTEE WAS AUTHORIZED BY CONGRESS TO SUBPOENA PETITIONER.

We demonstrate in our brief in *Wilkinson*, No. 37, pp. 34–39, that the petitioner there was subpoenaed by the House Committee on Un-American Activities to testify at the hearings in Atlanta in July 1958 relevant to the subjects of Communist colonization and infiltration, the Party's propaganda activities principally in the South, and the organization and reconstitution of the Communist Party.[12] The subject of the Party's organization and reconstitution, however, became a part of the hearings only when it was stated to Wilkinson after he refused to answer the question as to his membership in the Communist Party. Therefore, it was not a subject of inquiry when the other witnesses at the hearing testified. The other two subjects, which were the principal subjects of the entire hearings—Communist colonization and infiltration of other groups and organizations, and Communist propaganda activities in the South—are shown in our brief in *Wilkinson*, pp. 34–37, by the resolution of the Committee authorizing the hearings, the opening statement of the Chairman of the Committee at the hearings, the questioning and testimony of witnesses other than Wilkinson or petitioner here, the explanation of the question when Wilkinson refused

[12] We also show that another subject under investigation at the hearings as a whole was foreign Communist propaganda in the South. See our brief in *Wilkinson*, p. 37, note 11. But neither Wilkinson nor Braden was subpoenaed or questioned in relation to this subject.

to answer, and the closing statement of the Chairman of the subcommittee. This evidence is confirmed by the particular evidence shown in this case relating to the present petitioner.

The Staff Director of the Committee testified at petitioner's trial that the hearings in Atlanta were held to develop information relating to Communist infiltration, propaganda, operations, and techniques in the South (see *supra*, pp. 4–5). He said that petitioner was subpoenaed to appear before the subcommittee because of information that he was a member of the Communist Party; that he was a field representative of the Southern Conference Educational Fund, which was the successor to a Communist-front organization, and which itself engaged in Communist activity; that in this capacity he was travelling through the South setting up meetings, disseminating Communist propaganda, and doing other Communist work; that he was a writer and perhaps distributor for the Southern Newsletter, a Communist-controlled publication; and that he was active in circulating, in the South, Communist-organized petitions to Congress without describing their sponsorship (*supra*, pp. 8–11). The Staff Director further testified that the questions asked petitioner, which he refused to answer, were intended to discover information about Communist methods of infiltrating other organizations, of using non-Communist facilities to disguise the identity of the promoters of the group, and of spreading Party propaganda through petitions to Congress; about the operations of the Emergency Civil Rights Committee, which was believed to be involved in Communist propaganda activities; and about the Southern News-

letter, which was known to be Communist-controlled and spreading Communist propaganda (see *supra*, pp. 18 at note 7, 19–20 at note 8, 20–21 at note 9, 21–22 at note 10, 22–23 at note 11).

When petitioner appeared before the subcommittee and first objected to the pertinency of a question, he was told by the Staff Director that the Committee had information that he was a member of the Communist Party and had been active in Communist propaganda and other activity, principally in the South (see *supra*, p. 12). Subsequently, Representative Jackson stated that the subcommittee was investigating propaganda activities, which in context obviously meant Communist propaganda activities (see *supra*, pp. 15–16). The Staff Director told petitioner that a previous witness, Armando Penha, had testified concerning Communist infiltration of non-Communist organizations to further Communist objectives (see *supra*, p. 18). And, as we shall show (*infra*, pp. 42–45), all the questions asked petitioner—both those he answered and those he refused to answer—relate to Communist infiltration and propaganda activities, particularly in the South.

Thus, the record of petitioner's trial and of the hearings demonstrate that these were the two subjects under inquiry as to which petitioner was subpoenaed and questioned. And, as our brief in *Wilkinson* shows (pp. 39–40), these two subjects came clearly within Rule XI of the standing rules of the House (the Committee's authorizing resolution) and its gloss of legislative history which have "clothed the Un-American Activities Committee with pervasive authority to in-

vestigate Communist activities in this country." *Barenblatt* v. *United States, supra,* 360 U.S. at 118.

Petitioner, in claiming (Pet. Br. 40–42) that "[a]s a standard of criminal conduct Rule XI is fatally vague in its present application" (Pet. Br. 40), attempts to distinguish *Barenblatt* by stating that "[e]ven if Rule XI may be thus understood to authorize an investigation into Communist Party membership, * * * it cannot possibly be said to authorize, with the clarity essential to a criminal statute, an investigation into political and journalistic activities which were the focus here" (Pet. Br. 41–42). But this distinction is clearly without substance and amounts to an attempt to have this Court overrule *Barenblatt.* First, *Barenblatt,* like the instant case, involved a criminal prosecution, so that the standard of definiteness applied in criminal cases was applied there. Therefore, here, as in *Barenblatt,* the Court should look not only to Rule XI but to its gloss of legislative history in determining the authority of the Committee.[13]

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[13] The reason why the use of materials other than the statute is permissible is that Rule XI is a resolution delegating authority and is not a criminal statute. The criminal statute petitioner was tried under was 2 U.S.C. 192, *supra,* pp. 2–3, which is perfectly clear.

While the authority of the congressional committee is one of the elements of the crime under 2 U.S.C. 192, it is not necessary that a potential lawbreaker be able to measure with complete clarity the particular fact situation against the criminal statute to ascertain whether his act would be criminal. Thus, a criminal statute which allows self-defense need not spell out the details of permissible self-defense, and certainly not to the extent that no one could mistake the statute's applica-

Second, the record overwhelmingly proves that the subcommittee here was not investigating mere political and journalistic activities, but rather Communist infiltration and propaganda activities (see *supra*, pp. 32–34, and our brief in *Wilkinson*, pp. 34–39). Such Communist activities clearly come within the Court's statement of the "pervasive authority" of the Committee, as given in *Barenblatt*.

Third, the Committee in *Barenblatt* was not investigating mere Party membership, but rather Communist activity in the field of education (see 360 U.S. at 121, 124, 129). The questions asked Barenblatt concerning his Party membership were merely the introductory questions in that inquiry. Communist infiltration and propaganda activity in the South—the subjects of the inquiry in the present case—are surely just as within the "pervasive authority" of the Committee as Communist activity in education.

Fourth, one of the questions asked petitioner was whether he was a member of the Communist Party at the time he signed a letter (count five), which he admitted signing (see *supra*, p. 21). Thus, even if *Barenblatt* held that Rule XI and its gloss of legislative history only authorized the Committee to in-

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tion in every fact situation. Similarly here, it is enough that 2 U.S.C. 192 requires that the question be within the authority of the committee. Just as a potential lawbreaker must decide whether certain acts constitute self-defense, so a witness must decide whether a particular question is authorized. The only difference between the two situations is that the authority of the committee is governed by a non-criminal resolution, while the scope of self-defense is ordinarily not defined by any legislation at all. See also *infra*, p. 37.

vestigate Party membership, this question as to Party membership was authorized. Indeed, this question is almost identical to the question upheld in *Barenblatt* as to whether Barenblatt was a member of a particular Communist Party unit at the time he attended the University of Michigan four years before (360 U.S. at 114, 126 at note 25). Since petitioner was given concurrent sentences on all six counts, his conviction on this one count is sufficient to sustain the conviction. *E.g., Barenblatt,* 360 U.S. at 115; *Lawn* v. *United States,* 355 U.S. 339, 359; *Roviaro* v. *United States,* 353 U.S. 53, 59 at note 6.

Petitioner also argues (Pet. Br. 42) that he was not put on notice during the hearings as to the authority of the Committee. First, we do not believe that such notice is required. Petitioner cites no authority supporting his contention, and *Watkins* v. *United States,* 354 U.S. 178, and *Barenblatt* hold only that the witness must be apprised of the pertinency of the question to the subject under inquiry, upon proper objection. They do not indicate that a similar rule extends to the authority of the Committee even though the question whether the Committee in fact had authority to conduct the respective investigations was discussed in both decisions. A witness, particularly one who is represented by counsel, does not need to be apprised of the authority of the Committee, since both the authorizing resolution and its legislative gloss—which are the two sources of authority relied on in *Barenblatt,* 360 U.S. at 117–122—are matters of public record. See also *supra,* pp. 35–36 at note 13.

In any event, the whole tenor of the subcommittee's questioning made clear that it claimed authority to investigate Communist activities generally. Moreover, this claim was brought home to petitioner by several specific statements. When petitioner first refused to answer a question, the Staff Director of the Committee indicated that the Committee had an interest in legislation concerning a broad range of Communist activity, including the field of propaganda, and then stated that "the Committee on Un-American Activities has a mandate from the Congress * * * to maintain a surveillance over the administration and operation of numerous security laws that are presently on the statute books, including the Internal Security Act, the Communist Control Act of 1954, the Foreign Agents Registration Act, espionage and sabotage statutes" (see *supra*, pp. 12–13). Subsequently, when petitioner claimed that the mandate of the Committee was so vague "that nobody knows what you are supposed to be investigating," the Staff Director answered, "communism and Communists" (see *supra*, p. 15)—a description which is substantially the same as the "pervasive authority to investigate Communist activities" stated in *Barenblatt* (360 U.S. at 118). Later, Representative Jackson told petitioner that the mandate of the Committee tells it "to investigate the extent and scope of propaganda activities within the United States" (see *supra*, pp. 15–16), which in context clearly meant Communist propaganda activities.

II

THE QUESTIONS WERE PERTINENT TO THE SUBJECTS UNDER INQUIRY, AS A MATTER OF LAW, AND THIS PERTINENCY WAS MADE CLEAR TO PETITIONER

A. ACTUAL PERTINENCY IS A QUESTION OF LAW TO BE DECIDED BY THE COURT

Petitioner contends (Pet. Br. 32) that the pertinency of the questions to the subjects under inquiry was for the jury to decide and that therefore the trial court erred in holding (R. 70) that the six questions were pertinent as a matter of law.[14]

1. Significantly, however, petitioner's counsel (who is also one of his counsel in this Court) admitted in his opening statement to the jury (R. 16):

> As the counsel for the government has properly stated, the question of whether or not those questions were pertinent to the subject matter under inquiry has been ruled to be a question of law for the Court. But whether or not the defendant Carl Braden at the time he refused to answer those questions knew that they were pertinent to the subject matter under inquiry is a question of fact which will be submitted by the Court to you gentlemen.

Again in his closing argument to the jury, counsel tacitly conceded that actual pertinency was a matter of law for the court (R. 59). Only after the concluding arguments and the charge of the court did peti-

[14] The issue whether petitioner was sufficiently apprised by the subcommittee of this pertinency was of course a question of fact which the trial court properly submitted to the jury (see *infra*, pp. 45–54).

tioner's counsel claim for the first time that the jury should decide the question of actual pertinency (R. 75).

We submit that petitioner is precluded on two grounds from raising this objection at such a late time. First, the case was tried on the basis that actual pertinency was an issue to be decided by the trial judge. Thus, when the government presented evidence concerning the information which the subcommittee sought, from the hearings as a whole and from petitioner in particular, the jury was excluded (R. 23–38). Petitioner made no objection to exclusion of the jury (R. 23) and in fact asked that cross-examination concerning actual pertinency be conducted outside the presence of the jury (R. 35). Certainly, after much of the evidence concerning actual pertinency had not been presented to the jury (with petitioner's consent),[15] petitioner cannot claim the right to have the jury determine the issue.

Second, petitioner cannot fairly allow the trial court to rule on the issue of pertinency without objection and then when the ruling is unfavorable claim that the issue is properly one for the jury. By submitting the issue to the trial court, petitioner waived any right he had to trial by jury on this issue.

2. Petitioner is also wrong on the merits of his argument. Actual pertinency has been held by this

[15] The jury did have before it that portion of the evidence concerning actual pertinency which also related to whether petitioner was apprised of pertinency by the subcommittee, since this issue was to be, and was, submitted to the jury.

Court to be an issue of law properly decided by the trial court. The Court held in *Sinclair* v. *United States*, 279 U.S. 263, 299, that pertinency, like relevancy and materiality, are questions of law:

> The reasons for holding relevancy and materiality to be questions of law * * * apply with equal force to the determination of pertinency arising under § 102. The matter for determination in this case was whether the facts called for by the question were so related to the subjects covered by the Senate's resolutions that such facts reasonably could be said to be "pertinent to the question under inquiry." It would be incongruous and contrary to well-established principles to leave the determination of such a matter to a jury.

Accord, *Morford* v. *United States*, 176 F. 2d 54, 57 (C.A. D.C.), reversed on other grounds, 339 U.S. 258; *Bowers* v. *United States*, 202 F. 2d 447, 453 (C.A. D.C.); *Keeney* v. *United States*, 218 F. 2d 843, 845, 846–849 (C.A. D.C.); *Russell* v. *United States*, 280 F. 2d 688, 689 (C.A. D.C.), pending on petition for a writ of certiorari, No. 239, this Term; *Liveright* v. *United States*, 280 F. 2d 708, 714 (C.A. D.C.), pending on petition for a writ of certiorari, No. 328, this Term.

While the holding in *United States* v. *Orman*, 207 F. 2d 148, 155–156 (C.A. 3), on which petitioner relies (Pet. Br. 32), is not altogether clear, it seems that the trial court left it to the jury to find the facts and instructed them that, if they found certain facts, the questions were pertinent as a matter of law. The court stated that where "evidence *aliunde* is intro-

duced to prove pertinency * * * it is proper for [the court] to rule [as to pertinency] and then to submit the question and the evidence to the jury under appropriate instructions" (*id.* at 156). The phrase "it is proper" suggests that this procedure is not error,[18] but does not necessarily mean that the trial court was required to submit the issue to the jury. Certainly, the court of appeals did not reject the clear holding of this Court in the *Sinclair* case.

In any event, while evidence *aliunde* was admitted in this case as to actual pertinency (the testimony of the Staff Director at petitioner's trial (see *supra*, pp. 4–5, 10–11, 17–23)), the jury found on the basis of the evidence at the hearings themselves that petitioner was apprised of the pertinency of the questions. As we show below (see *infra*, pp. 45–54), this finding is fully supported by the evidence. Thus, even if *Orman* stands for the proposition petitioner claims—and if *Sinclair* is not inconsistent with that proposition—pertinency was found by the jury in this case even without considering other evidence which was introduced at the trial and which would also have supported its finding.

B. THE QUESTIONS WERE PERTINENT TO THE SUBJECTS UNDER INQUIRY

We have shown that the two subjects under investigation when petitioner was questioned were Commu-

[18] The *Keeney* case, *supra*, however, held that the trial court "erred in permitting the jury to hear testimony about the [defendant's] activities which bore only on pertinency and tended strongly to prejudice the jury" (218 F. 2d at 845; see *id.* at 846, 849).

nist infiltration and Communist propaganda activities in the South (see *supra*, pp. 32–34). All six questions which petitioner refused to answer, and as to which he was convicted, were clearly pertinent to these subjects under inquiry.

The question which was the subject of count one concerned whether petitioner attended a meeting in Atlanta in December 1957 (see *supra*, p. 17).[8] The Committee had information that petitioner was a member of the Communist Party; that in this capacity he had travelled throughout the South as a field representative of the Southern Conference Educational Fund, which the Committee believed to be Communist-controlled; that his activity was believed to include setting up meetings for the dissemination of Communist propaganda; and that a particular meeting in Atlanta in 1957 was one of his Communist activities intended to infiltrate other organizations on behalf of the Party (see *supra*, pp. 8–11, 12). The Staff Director of the Committee testified at petitioner's trial that the question was intended to secure information as to Communist techniques in penetrating other organizations (see *supra*, pp. 17–18 at note 7).

The question which was the subject of count two concerned the person who had solicited the quarters for a particular meeting of the Southern Conference Educational Fund (see *supra*, p. 19). As already stated, the Committee had information that the Fund was a Communist-controlled organization and that such meetings were used to disseminate Communist propaganda and infiltrate other organizations. The Staff director testified at the trial that this question

was intended to gain information about a Communist method of securing non-Communist facilities in order to disguise the identity of the promoters of the organization (see *supra*, p. 19 at note 8).

Counts three and four related to questions whether petitioner was connected with the Emergency Civil Liberties Committee and whether petitioner and Harvey O'Connor had discussed, during petitioner's recent visit to Rhode Island to see O'Connor, the plans and strategy of that Committee (see *supra*, pp. 19–20). The Committee had information that the Emergency Civil Liberties Committee was engaged in disseminating Communist propaganda, that its principal officer, Harvey O'Connor, was a Communist Party member, and that the petitioner had recently visited him (see *supra*, pp. 9–10, 14, 20 at note 8, 21 at note 9). These questions were asked in order to secure further evidence on the function and activities of the Emergency Civil Liberties Committee, particularly whether it was a Communist front (see *supra*, pp. 19–20 at note 8, 20–21 at note 9).

Count five involved a question whether petitioner was a member of the Communist Party when he signed a letter (which he admitted signing) asking its recipients to write, and to urge others to write, to Congress opposing "security" legislation (see *supra*, pp. 20–21). The Committee had information that Communists were circulating petitions in the South concerning legislative activity and that petitioner himself had engaged in this activity (see *supra*, pp. 9–10). Since petitioner was believed to be a Communist Party member, this question was asked to find further infor-

mation on Communist methods of disseminating propaganda in this way, and particularly as to the solicitation of signatures without disclosing the Communist auspices of the petition (see *supra*, pp. 21–22 at note 10).

Count six related to the question whether petitioner was connected with the Southern Newsletter (see *supra*, p. 22). The Committee had information that this publication was Communist-controlled, that its principal officer was a Communist, that it was disseminating Communist propaganda, and that petitioner was a contributor (see *supra*, pp. 9, 10–11, 22–23 at note 11). The Staff Director testified that the question was intended to secure further information on the publication (see *supra*, pp. 22–23 at note 11).

In sum, all six questions would either have provided in themselves further information on Communist infiltration or propaganda activities, or were introductory questions which would show whether petitioner could provide information on these subjects. The trial court, therefore, correctly held that the questions petitioner refused to answer were pertinent to the subjects under inquiry (R. 70).

C. PETITIONER WAS FULLY APPRISED OF THE PERTINENCY OF THE QUESTIONS

This Court held in *Watkins* v. *United States*, 354 U.S. 178, 214–215, that "[u]nless the subject matter has been made to appear with undisputable clarity, it is the duty of the investigative body, upon objection of the witness on grounds of pertinency, to state for the record the subject under inquiry at that time and the manner in which the propounded questions are pertinent thereto. To be meaningful,

the explanation must describe what the topic under inquiry is and the connective reasoning whereby the precise questions asked relate to it." This holding was reaffirmed and applied in *Barenblatt*, 360 U.S. at 123–125. We submit that the subcommittee here complied with the standards laid down in *Watkins* and that the jury's finding, based on proper instructions,[17] that petitioner was apprised of the pertinency of the question is fully supported by the evidence.

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[17] The trial court's instruction was (R. 72–73):

The Court charges you that to be pertinent to a question under inquiry within the meaning of the law and the charges in the indictment, the questions asked must have been known by the defendant at the time of the committee's hearing to have a reasonable relation to the subject allegedly under inquiry as set forth in the bill of particulars.

Now, in this case the government contends that the subject matter under inquiry was the extent, character and objects of Communist colonization and infiltration in the textile and other basic industries located in the South, Communist Party propaganda activity in the South, and the entry and dissemination within the United States of foreign Communist Party propaganda. If you find beyond a reasonable doubt that the subject matter under inquiry by the subcommittee at the time the defendant appeared before it was as the government contends and that the questions that the defendant allegedly refused to answer were either related to that subject matter with undisputed clarity from the wording of the particular questions, or from the course of the entire questioning of this defendant, or both, or if you find that the subcommittee made an explanation reasonably capable of describing to the ordinary person in the defendant's situation what the subject matter under inquiry was and the way the particular question related to it, then this final aspect of the criminal intent involved in this charge would have been found as to these refusals to answer these questions.

1: In *Watkins*, 354 U.S. at 208–209, the Court held that "[i]t is obvious that a person compelled to make this choice [whether to answer a question] is entitled to have knowledge of the subject to which the interrogation is deemed pertinent. * * * The 'vice of vagueness' must be avoided here as in all other crimes. There are several sources that can outline the 'question under inquiry' in such a way that the rules against vagueness are satisfied." The Court then made clear that these sources include the resolution authorizing the subcommittee hearings, the opening statement of the Chairman at the hearings, the questioning and testimony of witnesses at the hearings, and the response of the subcommittee when the witness refused to answer the questions on the ground of lack of pertinency (*id.* at 211–214). In *Barenblatt*, 360 U.S. at 124–125, the latter three factors were relied on to show that the witness was apprised of the subject under investigation.

The subjects under inquiry were conveyed to petitioner here by all the methods suggested in *Watkins*—by the resolution authorizing the subcommittee's investigation, which was introduced into the hearing record and which was available to petitioner, by the statement of the Chairman of the Committee made at the opening of the hearings, and by the prior questioning and testimony of other witnesses at the hearings [18] (see the Government's Brief in *Wilkinson*, No.

[18] One of petitioner's co-counsel at the hearings was the counsel for two witnesses preceding petitioner, including the second witness on the opening day of the hearings (see U.S. Ex. 10, pp. 2627, 2629, 2663).

37, this Term, pp. 4, 6–8, 8–12). And independently of these other methods, the subject under inquiry was explained to petitioner when he himself appeared before the subcommittee.[19]

When petitioner first refused to answer a question on the ground of pertinency,[20] the Staff Director of the Committee explained to him that the Committee had information that he was a member of the Communist Party and was participating in Communist propaganda and other activities principally in the South (see *supra*, p. 12). The Staff Director further stated that the Committee was considering bills relating to the registration of Communists, the dissemination of Communist propaganda, and other security matters (see *supra*, pp. 12–13). And then he said to petitioner that the subcommittee was holding hearings in Atlanta "for the purpose of assembling factual material which the committee can use, in connection with other material which it has assembled," in considering these and other bills and existing statutes (see *supra*, p. 13).

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[19] The only additional materials which we have cited to show the two subjects under inquiry at the hearings (*supra*, pp. 32–34), were testimony of the Staff Director of the Committee at petitioner's trial, the testimony of witnesses who testified after petitioner at the hearings, and the closing statement of the subcommittee Chairman. These materials, however, are merely cumulative evidence of the subjects under inquiry which were already clearly conveyed to petitioner when he testified at the hearings.

[20] The question concerned where he had departed from to go to Rhode Island to visit Harvey O'Connor (see *supra*, p. 12). This question was not involved in petitioner's indictment or conviction.

Petitioner was told that he was being questioned to secure information for these same purposes (see *supra*, p. 14). Petitioner answered that "my beliefs and my associations are none of the business of this committee" because of the First Amendment (U.S. Ex. 10, p. 2670). He then said "I stand on my previous position under the first amendment, that such a question has no pertinency to any legislative purpose and it violates my belief" (*ibid.*). Thus, when petitioner continued to object that "the question has no possible pertinency to any legislation" (*ibid.*; *supra*, pp. 16–17), he apparently meant that the questions were not pertinent to any legislative purpose or legislation valid under the First Amendment. Petitioner apparently understood—as any reasonable man would—that the subjects under investigation were Communist propaganda and other activities in the South, even though he believed that these subjects violated the First Amendment.[21] Subsequently, petitioner was thrice told that the Staff Director's explanation of the subject under investigation should be understood to relate to all subsequent questions asked petitioner (see *supra*, pp. 14–15).

When petitioner again objected to the investigation, Representative Jackson stated that the Committee was given authority to investigate "the extent and scope of propaganda activities within the United States"—in context obviously meaning Communist propaganda activities—and "[t]hat is precisely what we are doing. And when you cast doubt, or attempt to cast doubt, on the relevancy of the question, when you are in the

[21] This contention is discussed below at pp. 59–72.

position you are to influence public opinion through your writings—and I gather through your writings on behalf of the Communist Party—it is very clearly within the purview of this committee to inquire into those activities" (see *supra*, pp. 15–16). After petitioner had refused to answer the question which constituted the basis for count one, the Staff Director added to his previous explanation of the subject matter that Armando Penha had told the subcommittee that Party members are under instructions to infiltrate non-Communist organizations (see *supra*, p. 18). After petitioner refused to answer the question which was the basis of count two, he stated that he and his counsel understood that "an appropriate explanation of the pertinency" had been given as to each of his refusals to answer (see *supra*, p. 20). Thus, he again indicated that he understood the subcommittee's statement as to the subject under inquiry, but apparently still disagreed that it was a valid subject under the First Amendment.

We submit that the subcommittee's explanations to petitioner, even considered alone without the other sources allowed by *Watkins*, show that petitioner was clearly informed that the subjects under inquiry were Communist propaganda activity and Communist infiltration of other organizations, especially in the South.[22] Indeed, petitioner himself indicated that he

[22] Most of the questions asked petitioner and the colloquy between petitioner and the subcommittee related on their face to events in the South, including the Southern Conference Educational Fund, the Southern Newsletter, and the conflict over integration (see U.S. Ex. 10, pp. 2670–2673, 2675, 2677–2681).

understood the subjects under inquiry as well as the pertinency of the questions.[23]

2. As to the "connective reasoning" between the subject of Communist infiltration and propaganda activity in the South and the particular questions asked, petitioner indicated that he understood the pertinency of the questions to the subjects which had been explained to him, even though he disagreed that the subcommittee had the constitutional authority to investigate this subject (see *supra*, p. 49). In addition, petitioner was told when he first refused to answer that the Committee had information that he was a member of the Communist Party who was engaged in propaganda activity principally in the South (see *supra*, pp. 12, 15). He subsequently refused to answer a question, which preceded any of his refusals to answer charged in the indictment, as to what he, as "an identified member of the Communist Party, [had] to do with this letter" which petitioned Congress to stop the Atlanta hearings of the Committee (see *supra*, p. 16). He was told that it was very possible that the letter had been prepared by a Communist (U.S. Ex, 10, pp. 2674–2675). Petitioner then testified that he had travelled all over the South as field organizer for the Southern Conference Educational Fund. When he was then asked whether he

[23] If only one subject was made sufficiently clear to petitioner, several counts are still valid since petitioner was apprised of the pertinency of several questions to each of the two subjects during the hearings (see *infra*, pp. 51–54). As we have stated, if any one count is valid, the conviction must be sustained (see *supra*, p. 37).

had participated in a meeting in December 1957 in Atlanta (count one; see *supra*, p. 17), the connection between the question and Communist propaganda activities was clear. The subcommittee was attempting to discover whether the meeting (which the question assumed had occurred) was involved in any way with Communist propaganda activities which petitioner's presence and participation would tend to show.

Before the next question was asked, petitioner was told that Armando Penha had testified that Party members are under orders to infiltrate non-Communist organizations for Communist purposes (see *supra*, p. 18). Petitioner then admitted attending a board meeting of the Southern Conference Educational Fund. When he was asked who had solicited the quarters used for this meeting in the Red Cross Building in Atlanta (count two; see *supra*, p. 19), he could hardly have failed to understand that the subcommittee wished to find out how an organization which had been infiltrated by Communists could obtain such respectable quarters.

The next questions concerned whether petitioner was connected with the Emergency Civil Liberties Committee and whether he and Harvey O'Connor had developed plans of the Emergency Committee when they recently met together (counts three and four; see *supra*, pp. 19–20). Petitioner had previously been told that the Committee believed that Harvey O'Connor, who petitioner stated was the principal officer of the Emergency Committee, was a member of the Com-

munist Party and that the Emergency Committee was a Communist front (see *supra*, p. 14). Petitioner had testified that when he was subpoenaed he was visiting O'Connor (see *supra*, pp. 12–13). Thus, these questions clearly related to Communist infiltration of other organizations.[24]

Perhaps the most obviously pertinent question to the subject under inquiry was that which constituted the basis for count five: "Were you a member of the Communist Party the instant you affixed your signature to that letter?" (see *supra*, p. 22). This letter, which petitioner had read to the subcommittee, was signed by petitioner and his wife, and asked the recipients to write, and to get others to write, their Congressmen opposing certain "security" legislation (see *supra*, p. 21). Petitioner had previously been told that another letter directly petitioning Congress was likely prepared by a Communist (see *supra*, p. 17). In asking whether petitioner was a Party member, the subcommittee was taking the first step of ascertaining whether this effort to petition Congress was a Communist infiltration and propaganda activity—a possibility which was certainly reasonable since it was signed by a person whom the Committee reasonably believed to be a Party member. With regard to a similar question as to the witness' Communist

[24] Petitioner cites (Pet. Br. 30–31) *O'Connor* v. *United States*, 240 F. 2d 404 (C.A. D.C.), for the proposition that this information concerning Mr. O'Connor is too vague to support a showing of pertinency. In fact, that case held that the question whether the witness was at any time a member of "the Communist conspiracy" was too vague; the court did not consider its pertinency.

Party membership, this Court held in *Barenblatt* that "pertinency * * * was clear beyond doubt" (360 U.S. at 125), without further explanation, to the investigation of Communist activity in education. Similarly, here, the pertinence of petitioner's membership in the Party to the subcommittee's investigation of Communist propaganda activity in the South was clear beyond doubt.

Petitioner was then told that the editor of the Southern Newsletter had been identified as a Communist and that it was distributed from Louisville, Kentucky. The subcommittee asked petitioner whether, since he was from Louisville, he had anything to do with that publication (count six; see *supra*, p. 22). Again, petitioner was clearly apprised that the question related to the Communist propaganda activities in which he was believed to be engaged.

In sum, we believe that the evidence fully justified the finding of the jury that petitioner was apprised of the pertinency of the questions to the subjects under inquiry. *At the least*, the question in count five relating to petitioner's membership in the Communist Party comes squarely within this Court's holding in *Barenblatt*. And as we have stated (*supra*, p. 37), the validity of this one count is in itself sufficient to sustain the conviction.

III

2 U.S.C. 192 REQUIRES PROOF ONLY OF A DELIBERATE REFUSAL TO ANSWER, AND NOT PROOF OF MALICE OR BAD PURPOSE

A. Petitioner contends (Pet. Br. 43–46) that, since he justifiably relied on *Watkins* v. *United States*,

supra, he could not properly be convicted of a wilful failure to answer. But this Court in *Sinclair* v. *United States*, 279 U.S. 263, specifically rejected a similar contention made with regard to Section 102 of the Revised Statutes, the predecessor of 2 U.S.C. 192 (279 U.S. at 299):

> There is no merit in appellant's contention that he is entitled to a new trial because the court excluded evidence that in refusing to answer he acted in good faith on the advice of competent counsel. The gist of the offense is refusal to answer pertinent questions. No moral turpitude is involved. Intentional violation is sufficient to constitute guilt. There was no misapprehension as to what was called for. The refusal to answer was deliberate. The facts sought were pertinent as a matter of law, and § 102 made it appellant's duty to answer. He was bound rightly to construe the statute. His mistaken view of law is no defense.

As *Barenblatt* repeatedly makes clear, the *Barenblatt* decision is consistent with *Watkins* (see 360 U.S. at 116–117, 122–124, 126–127, 133).[25] Thus, petitioner simply failed to construe the statute and the *Watkins* holding properly.

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[25] Petitioner's reliance (Pet. Br. 46) on *Harris* v. *Jex*, 55 N.Y. 421, ignores this fact. There the court was considering the effect of an overruling by this Court of an early decision in the legal tender cases. *Hepburn* v. *Griswold*, 8 Wall. 603, overruled by *Knox v. Lee*, 12 Wall. 457.

As the discussion below shows (pp. 56–59), we do not believe that a witness can justify his refusal to answer on a decision of this Court which is later overruled since good faith is not a defense. But, in any event, such a case is not before the Court.

Petitioner, however, claims (Pet. Br. 44–46) that the decision in *Sinclair* is no longer controlling because subsequently this Court has held that 2 U.S.C. 192 requires proof of a wilful refusal to answer—"wilful" in the sense of malice or bad purpose. *United States* v. *Murdock*, 290 U.S. 389, 396–397, on which petitioner relies, considered a prosecution for refusing, in violation of the Revenue Act of 1926, to supply the Bureau of Internal Revenue with information, and held that good faith was a defense. The Court distinguished *Sinclair* by stating that R.S. § 102, unlike the Revenue Act of 1926, did not make wilfulness an element of the crime of refusal to answer (290 U.S. at 397): "The applicable statute did not make a bad purpose or evil intent an element of the misdemeanor of refusing to answer, but conditioned guilt or innocence solely upon the relevancy of the question propounded. Sinclair was either right or wrong in his refusal to answer, and if wrong he took the risk of becoming liable to the prescribed penalty."

Since *Murdock* and *Sinclair*, this Court has not, contrary to petitioner's contention, read the element of wilfulness—in the sense of bad purpose or evil intent—into the contempt of Congress statute. On the contrary, in *Quinn* v. *United States*, 349 U.S. 155, 165, the Court stated that 2 U.S.C. 192 requires for criminal intent only "a deliberate, intentional refusal to answer." That same day, *Emspak* v. *United States*, 349 U.S. 190, 202, held that 2 U.S.C. 192 includes "the element of deliberateness." And *Watkins* v. *United States*, *supra*, 354 U.S. at 208, explicitly held:

> As the Court said in *Sinclair* v. *United States*, 279 U.S. 263, the witness acts at his peril. He is ". . . bound rightly to construe the statute." *Id.*, at 299. An erroneous determination on his part, even if made in the utmost good faith, does not exculpate him if the court should later rule that the questions were pertinent to the question under inquiry.

The courts of appeals have held that the element of wilfulness need not be specifically charged in the indictment for failure to answer questions. *United States* v. *Deutch*, 235 F. 2d 853, 854 (C.A. D.C.), holds, relying on *Quinn*, that the indictment need only charge an intentional and deliberate act, which it does by using the word "refused." Accord, *Sacher* v. *United States*, 240 F. 2d 46, 53 (C.A. D.C.) vacated on other grounds, 354 U.S. 930; *Barenblatt* v. *United States*, 240 F. 2d 875, 878 (C.A. D.C.), reversed on other grounds, 354 U.S. 930. On the other hand, *United States* v. *Lamont*, 18 F.R.D. 27, 32 (S.D. N.Y.), affirmed on other grounds, 236 F. 2d 312 (C.A. 2), held that "wilfulness, or a deliberate, intentional refusal to answer" must be charged and therefore found implicitly that using the word "refused" was not enough. But it is clear that, as to the issue involved here, wilfulness was equated to a deliberate, intentional refusal to answer.

The portion of 2 U.S.C. 192 proscribing failure to produce documents requires that "wilfulness" be pleaded and proved. But, as in *Lamont*, the courts have held that such wilfulness requires only that the act be intentional and deliberate and not that it be done for an evil or bad purpose. See, *e.g.*, *Fields* v.

United States, 164 F. 2d 97, 100 (C. A. D.C.), certiorari denied, 332 U.S. 851; *Barsky* v. *United States,* 167 F. 2d 241, 251 (C.A. D.C.), certiorari denied, 334 U.S. 843. Thus, the decisions of this and the lower courts uniformly hold that wilfulness under 2 U.S.C. 192 means no more than a deliberate and intentional act.

B. Petitioner was indicted for knowing, wilful, and unlawful refusals to answer six questions (R. 45). The trial court, consistently with the decisions discussed above, charged the jury (R. 69):

> [Y]ou are to decide merely whether [petitioner] intentionally refused to answer without regard of any motive that he may have had. Such refusal does not require evil intent or bad motive. Therefore, good motive is no defense. Even * * * refusing upon advice of counsel is not reason or justification.[26]

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[26] The trial court further charged the jury that (R. 71–72):

> [I]f you so find that there was such a failure to answer, you will determine whether it was wilful failure, and, therefore, a refusal as charged in the indictment. The word wilful does not mean that the refusal or failure to comply would necessarily be for evil or malicious purposes. That is beside the point. The reason for the refusal is immaterial so long as the refusal was a deliberate and intentional one rather than mere accident or oversight or inadvertence, or the result of a misunderstanding.
>
> Now, I have already said that merely because the defendant may have misunderstood his right and may have thought that he had the right to refuse to answer because of the advice of counsel or for some other reason, that wouldn't be the type of misunderstanding that I have in mind. The kind of misunderstanding that I have in mind is a situation where he didn't understand that he was required to make an answer, that it hadn't been brought home to him that the questions asked were pertinent or

Petitioner neither proposed different instructions on this issue (R. 11–12) nor excepted to the charge (R. 75). Accordingly, the jury found petitioner guilty of having wilfully refused to answer, under proper and unchallenged instructions. This finding is fully supported by the record.

IV

THE SUBCOMMITTEE'S INVESTIGATION DID NOT VIOLATE THE FIRST AMENDMENT

In *Barenblatt* v. *United States, supra,* the Court held that "[w]here First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown" (360 U.S. at 126). In striking this balance, the courts must first determine whether the "investigation was related to a valid legislative purpose, for Congress may not constitutionally require an individual to disclose his political relationships or other private affairs except in relation to such a purpose" (*id.* at 127).

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that the subcommittee had overruled his objections and expected him to answer, notwithstanding his objections, or where a failure to answer was due to a misunderstanding of the question itself. If you believe beyond a reasonable doubt with respect to each count that the defendant refused to answer the question alleged in that count in the indictment and that that refusal was intentional and deliberate after a clear demand by the subcommittee to answer, notwithstanding his objection, then that aspect of the proof of the case would be satisfied.

A. THE SUBCOMMITTEE WAS ACTING PURSUANT TO A VALID LEGISLATIVE PURPOSE

In our brief in *Wilkinson*, No. 37, pp. 51–52, we show that, under this Court's decision in *Barenblatt*, 360 U.S. at 127–132, the two subjects under inquiry when petitioner testified—Communist infiltration and propaganda activity in the South—are valid legislative purposes, clearly not prohibited by the First Amendment.

Petitioner, however, attempts to distinguish *Barenblatt* on several grounds. First, he claims (Pet. Br. 20, 21, 22), that *Barenblatt* allows Congress only to investigate the Communist Party itself. In fact, however, *Barenblatt* involved an investigation of Communist activity in the field of education (see 360 U.S. at 121, 124, 129), not of the Communist Party itself, and the Court specifically held that such an investigation was not barred by the First Amendment (*id.* at 129–132). Similarly, the First Amendment does not forbid an investigation of Communist infiltration and propaganda activity.

Second, petitioner argues (Pet. Br. 19–20, 21) that *Barenblatt* upholds only Congress' power to investigate past and present Communist Party membership. It is true that *Barenblatt* specifically upheld only the questions relating to Party membership and found it unnecessary to consider the validity of Barenblatt's conviction for refusal to answer questions which on their face do not directly relate to participation in or knowledge "of alleged Communist Party activities at educational institutions" (360 U.S. at 115). Neverthe-

less, the whole rationale of the decision supports the power of a congressional committee, having information of Communist activity in educational institutions, to inquire further into the nature of this activity. Thus, the Court held that Congress' power of investigation extends beyond its power to legislate, "for of necessity the investigatory process must proceed step by step" (360 U.S. at 130). Moreover, in distinguishing *Sweezy* v. *New Hampshire*, 354 U.S. 234, which involved an investigation of the content of a lecture at a university and a witness' connections with the Progressive Party, the Court stated that "[t]his is a very different thing from inquiring into the extent to which the Communist Party has succeeded in infiltrating into our universities, or elsewhere, persons and groups committed to furthering the objective of overthrow" [27] (360 U.S. at 129). If the Committee could only identify Communists active in education but could not inquire as to the extent or nature of their activity, the value of this information to Congress would be relatively slight. In fact, such information alone constitutes little more than exposure; only if the Committee can pursue the inquiry further is information necessary for the consideration and evaluation of legislation to be obtained.

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[27] The Court cited at this point a statement by Representative Jackson (which it had earlier quoted) which says in part (360 U.S. at 122, note 20): "We [the Committee] are interested * * * in finding out who the Communists are and *what they are doing to further the Communist conspiracy*" (emphasis added).

In any event, one of the questions asked petitioner was whether, at a particular time,[28] he was a member of the Communist Party (count five; *supra*, p. 21). Since *Barenblatt* upheld two questions relating to that witness' past membership in the Communist Party (360 U.S. at 114, 126), this question in the present case was clearly proper. And, as we have emphasized, if one of the counts on which petitioner was convicted is valid, his conviction must be sustained (see *supra*, pp. 37, 54).

Third, petitioner repeatedly claims (Pet. Br. 21, 22–23, 24, 25, 27, 28, 29) that *Barenblatt* only allows investigation of violent overthrow of the Government and there is nothing in the record here that suggests that this investigation would have been of any value in protecting the Nation in this regard. In fact, however, *Barenblatt* noted the "close nexus between the Communist Party and violent overthrow of government" and therefore upheld an investigation "into the extent to which the Communist Party has succeeded in infiltrating into our universities, or elsewhere, persons and groups committed to furthering the objective of overthrow" (360 U.S. at 128–129). Thus, the nature of the Communist Party itself supplied the connection between the investigation of Communist activities and overthrow of the Government. The Court specifically rejected the need for any fur-

[28] That time was when petitioner signed a letter, which he admitted having signed (see *supra*, p. 21). The letter shows that it was written between April 1956, when *Pennsylvania* v. *Nelson*, 350 U.S. 497, was decided, and July 1958, when the hearings were held.

ther showing of that connection in each individual committee investigation by stating that "[t]he strict requirements of a prosecution under the Smith Act * * * are not the measure of the permissible scope of a congressional investigation into "overthrow," for of necessity the investigatory process must proceed step by step" (*id.* at 130).[29]

And fourth, petitioner argues (Pet. Br. 36–40) that the subcommittee was pursuing a series of non-legislative purposes: attempting to stifle the Committee's critics by subpoenaing them; considering whether to cite the Emergency Civil Liberties Committee as a Communist front; investigating political pressure put on Congress relating to security legislation; and investigating petitioner's motives in supporting integration and civil rights.

We show in our brief in *Wilkinson,* No. 37, pp. 51–52, that Party activity in the field of propaganda includes efforts to abolish or hinder the Committee. Similarly, Communist efforts to put pressure on Congress relating to security measures is also a form of Party propaganda. There is no reason to exclude arbitrarily, without logical reason, these particular forms of Party propaganda from Party propaganda activities in general. And just as *Barenblatt* held that Congress can investigate Communist activities in education, an area likewise protected by the First Amendment, so it can investigate Communist propaganda activities. Moreover, we show in *Wilkinson,* pp. 53–55, that even

[29] We also emphasize that the record shows that the purpose actually underlying the hearings was the danger from the Party of overthrow of the Government. See the Government's Brief in *Wilkinson*, p. 57, note 20.

if, for some reason, Party criticism of a congressional committee is not considered as a propaganda activity, Congress can nevertheless investigate such criticism by the Party because of the close connection between the Party and overthrow of the Government of the United States. The same principle should apply equally to Party efforts to pressure or influence Congress as to security measures.[30]

In any event, while petitioner was questioned concerning a petition criticizing the Committee, these questions were the result of petitioner's own action. No questions were asked on this subject until petitioner himself produced the petition opposing the hearings and criticizing the Committee (U.S. Ex. 10, p. 2673). And none of the questions on which petitioner was convicted related to the petition or any other criticism of the Committee.[31] The only question asked petitioner

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[30] Insofar as petitioner claims that the Committee was attempting to stifle criticism of itself, he is attempting to challenge the motives of the Committee's members just as much as if he charged that the Committee was attempting to expose him. *Watkins* v. *United States*, 354 U.S. at 200, and *Barenblatt*, 360 U.S. at 132–133, hold that the courts have no authority to inquire into the motives of the members of a congressional committee when the committee is acting pursuant to its constitutional power. See our brief in *Wilkinson*, pp. 55–56.

[31] Petitioner claims (Pet. Br. 36) that his association with the Emergency Civil Liberties Committee was investigated (counts three and four; see *supra*, pp. 19–20) because of that organization's criticism of the committee. But the record does not support this contention; on the contrary, the Staff Director told petitioner at the hearings and testified at his trial that the Committee had information that the principal officer of the Emergency Civil Liberties Committee was a Communist and that the organization was a Communist front (see *supra*, pp. 9, 10, 14). A Communist organization can hardly be immunized from investigation because it criticizes the Committee.

relating in any way to efforts to influence Congress as to security measures was that concerning whether petitioner was a Party member when he signed a letter asking the recipients to write their Congressmen (count five; see *supra*, p. 21). Apart from all else, this question does not delve far into the Party's activities in influencing Congress; on the contrary, it is simply the same kind of question as to Party membership upheld in *Barenblatt* (see *supra*, pp. 37, 54, 62).

The Staff Director of the Committee, testifying at petitioner's trial, suggested that one of the reasons for questioning petitioner about the Emergency Civil Liberties Committee (counts three and four; see *supra*, pp. 19–20) was to determine whether that organization should be cited as a Communist front (see *supra*, pp. 19–20 at note 8, 20–21 at note 9). But in this same testimony he repeatedly stated that the dominant purpose of the Committee as to these particular questions and petitioner's testimony as a whole was to evaluate existing and pending legislation (see *supra*, pp. 5, [illegible]–18 at note 8, 21 at note 9, [illegible]–22 at note 10, 22–23 at note 11). The same statements were repeated numerous times by the Chairman of the Committee, the Chairman of the subcommittee, and the Staff Director throughout the hearings themselves (see *supra*, pp. 5, 12–14, and our brief in *Wilkinson*, pp. 4, 6–7, 12–13, 15–16, 17, 18, 22–23, 25). Thus, it would appear that "citation" of an organization as a Communist front was merely a designation that the organization was at least to a great extent Communist-controlled and should be regarded as such in considering the need for legislation. But

even if the "citation" of organizations is not considered as related to the evaluation of legislative proposals and is, as petitioner claims, a non-legislative purpose, the questions concerning the Emergency Civil Liberties Committee were intended to, and did, relate to the investigation of Communist propaganda activities (see *supra*, pp. 44, 52–53). Thus, the two questions as to the Emergency Committee each had a valid legislative purpose.

Petitioner, in contending that the subcommittee was investigating integration and civil rights, is raising once again the claim he made at the hearings. Representative Jackson emphatically denied this claim, at the hearings, by stating categorically that the subcommittee did not care about petitioner's opinions and was not concerned with integration or segregation; instead, he said, the subcommittee was investigating petitioner's actions on behalf of the Communist Party (see *supra*, p. 16). Even if, in fact, some of these actions concerned integration or civil rights, the Committee could still investigate them, not as part of an investigation of integration, but rather as part of an investigation of Communist activities. For, as this Court has recognized (see *Barenblatt*, 360 U.S. at 128–129), the ultimate objective of the Communist Party to which its intermediate and even laudable objectives (such as integration and civil rights) are directed, is overthrow of the Government of the United States. And whether or not Congress could ultimately legislate concerning such Communist activities, *Barenblatt* clearly indicates that the investigative power of Con-

gress extends beyond the limits of its powers to legislate (*id.* at 130).[32]

B. THE BALANCE OF INDIVIDUAL AND GOVERNMENTAL INTERESTS SUPPORTS THE SUBCOMMITTEE'S INQUIRY

In *Barenblatt*, this Court held that "the balance between the individual and the governmental interests here at stake must be struck in favor of the latter, and that therefore the provisions of the First Amendment have not been offended" (360 U.S. at 134). In the Government's Brief in *Wilkinson*, pp. 55–60, we point out that the governmental interests at stake are at least as strong as those in *Barenblatt*. Since the same hearings and two of three subjects under inquiry are involved in this case and in *Wilkinson* (see *supra*, pp. 32–34), the governmental interest is virtually identical in both cases. Therefore we respectfully refer the Court to our brief in *Wilkinson*.

As in both *Barenblatt* and *Wilkinson*, the record indicates no effort by the subcommittee to pillory

[32] In a lengthy appendix (Pet. Br. 51–65), petitioner cites other instances of allegedly non-legislative inquiries by the Committee. While we do not agree with most of petitioner's analysis, we do not believe it is necessary to answer these claims in detail. It is sufficient to note that the record of the hearings involved here either shows on its face that the allegations made by petitioner as to other hearings do not apply to it or, at least, does not support such allegations here. Even if we assume *arguendo* that the Committee has frequently indulged in other non-legislative inquiries, the constitutionality of an investigation, any more than of a statute, cannot be decided by citing other instances of legislative unconstitutionality. The responsibility of the judicary when considering the constitutional power of another co-equal branch of the Government is far too serious to allow decision by such a process of analogy.

witnesses. On the contrary, the subcommittee patiently explored the valid legislative purposes of the inquiry and even suggested the possibility of petitioner's invoking the Fifth Amendment (see *supra*, pp. 12–14). Second, the relevancy of the questions, as we have seen (*supra*, pp. 42–54), is not open to doubt. Indeed, the question as to petitioner's membership in the Communist Party when he signed a particular letter is almost identical to the question upheld in *Barenblatt* as to whether Barenblatt was a member of a particular Communist Party club while at the University of Michigan (360 U.S. at 114, 126, note 25)—both questions related to Party membership at a time a few years before the question. Third, petitioner, unlike *Barenblatt*, was not involved in the field of education, which is perhaps a particularly sensitive area requiring the protection of the First Amendment.

Petitioner, however, argues (Pet. Br. 26–29) that the record does not show that petitioner was a Communist Party member or that the Southern Conference Educational Fund, the Emergency Civil Liberties Committee, or the Southern Newsletter had any connection with the Communist Party. Thus, petitioner appears to be claiming that, unlike in *Barenblatt*, his "appearance as a witness follow[ed] from indiscriminate dragnet procedures, lacking in probable cause for belief that he possessed information which might be helpful to the Subcommittee" (360 U.S. at 134), and that therefore the private interest of petitioner outweighs the governmental interest. But the fact is that petitioner was told four times at the hearings by the Staff Director that he

had been positively identified by reputable, responsible witnesses under oath as a Communist Party member and that the Committee had information that he was actively participating in Communist activity; one of these witnesses was disclosed to be Alberta Ahearn (see *supra*, pp. 12, 15, 16, 23; Hearings before the Subcommittee to Investigate the Administration of the Internal Security Act and other Internal Security Laws of the Committee on the Judiciary, United States Senate, 85th Cong., 1st Sess., p. 37). At petitioner's trial, the Staff Director stated, in detail, that the Committee had information that petitioner had travelled throughout the South on Party work which included setting up meetings and disseminating Party propaganda, that he had participated in such a meeting as a Communist in Atlanta in 1957, that he participated in the Southern Newsletter as a Communist, and had recently travelled to Rhode Island to meet with another leading Communist (see *supra*, pp. 8–11).

As to the Southern Conference Educational Fund, petitioner was told at the hearing that it was the successor organization of the Southern Conference for Human Welfare, which the Senate Internal Security Subcommittee had determined to be a Communist front (see *supra*, p. 23). Furthermore, petitioner, who was believed to be a Party member, admitted being a field organizer of the Fund (see *supra*, p. 11). The Staff Director stated at petitioner's trial that the Committee had information as to the above facts and said that petitioner was doing Party work including setting up meetings and distributing Party

propaganda in his capacity as a Fund organizer (see *supra,* pp. 8–9, 11).

The Staff Director explained to petitioner at the hearings and testified at the trial that Harvey O'Connor, who petitioner admitted and the Committee knew was the principal officer of the Emergency Civil Liberties Committee, had been identified as a "hard-core" member of the Communist Party and that the Emergency Committee had been determined by a congressional committee to be a Communist front (see *supra,* pp. 9, 10, 12, 14, 19–20 at note 8, 21 at note 9). At petitioner's trial, the Staff Director further testified that this organization was active in disseminating Communist propaganda (see *supra,* p. 21 at note 9).

Petitioner was also told at the hearings that the editor of the Southern Newsletter, Eugene Feldman, had been identified as a Communist (see *supra,* p. 22). In fact, only the previous day, Armando Penha, a former Party member, had testified that he knew Feldman as a Party colonizer in the South (see *supra,* p. 6). The Staff Director testified at petitioner's trial that the Committee had information that petitioner, who had been identified as a Communist, contributed to the Southern Newsletter, that it circulated in the South under Communist auspices, and that it was controlled by Communists (see *supra,* pp. 9, 10–11, 22–23 at note 11).

There is nothing in *Barenblatt* suggesting a requirement of *judicial proof* that the witness is a Communist Party member and that the organizations inquired into are Communist-controlled before a congressional committee can even investigate to ascertain the

facts.[33] If the Committee had such complete proof there would be little need for an investigation. Rather, *Barenblatt* recognized that "the investigatory process must proceed step by step" (360 U.S. at 130) and specifically required only the significantly less strict standard of "probable cause for belief that [the witness] possessed information which might be helpful to the Subcommittee" (360 U.S. at 134). We submit that the above information—much of it based on named witnesses before the Committee and on prior investigations by another congressional committee—provided adequate probable cause for belief that petitioner possessed information relating to the Committee's responsibility of investigating Communist activities.[34]

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[33] Petitioner objects to reliance on "undisclosed information" (Pet. Br. 27). By this he apparently means testimony of witnesses not themselves possessing personal knowledge (see Pet. Br. 27-28), since, as we have described, the Committee disclosed in considerable detail the nature of its information. Thus, petitioner is in effect demanding the virtual equivalent of evidence which would be required in a trial. In this regard, it is significant that probable cause for an arrest, with or without a warrant, may be satisfied by hearsay evidence, consistent with the Fourth Amendment. See *Draper* v. *United States*, 358 U.S. 307.

[34] Petitioner relies (Pet. Br. 25) on four cases, none of which is apposite. As we have shown, the standards laid down in *Barenblatt* are met here. Likewise, *Watkins* v. *United States*, *supra*, does not support petitioner's contentions. As to *Sweezy* v. *New Hampshire*, 354 U.S. 234, the Court stated in *Barenblatt* (360 U.S. at 129):

> • • • The vice existing there was that the questioning of Sweezy, who had not been shown ever to have been connected with the Communist Party, as to the contents of a lecture he had given at the University of New Hampshire, and as to his connections with the Progressive Party, then

In sum, we believe that, as in *Barenblatt*, "the balance between the individual and the governmental interests here at stake must be struck in favor of the latter, and * * * therefore the provisions of the First Amendment have not been offended" (360 U.S. at 134).

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the court of appeals should be affirmed.

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on the ballot as a normal political party in some 26 states, was too far removed from the premises on which the constitutionality of the State's investigation had to depend to withstand attack under the Fourteenth Amendment. * * * This is a very different thing from inquiring into the extent to which the Communist Party has succeeded in infiltrating into our universities, or elsewhere, persons and groups committed to furthering the objective of overthrow. And in *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, 465–466, this Court, in finding that the state had no valid interest in the membership list of the N.A.A.C.P., distinguished *Bryant* v. *Zimmerman*, 278 U.S. 63, on the ground that *Bryant* concerned the Ku Klux Klan, an organization committed to violence.

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